

OREGON SHORES CONSERVATION COALITION
BRUCE WAUGH

IBLA 84-313

Decided September 17, 1984

Appeals from management plan decision of the Salem, Oregon, District Manager, Bureau of Land Management, for the Yaquina Head Outstanding Natural Area.

Affirmed.

1. Administrative Procedure: Administrative Review -- Board of Land Appeals

To the extent a management plan decision for the Yaquina Head Outstanding Natural Area is the final implementation decision on certain actions, it is a decision appealable to the Board of Land Appeals under 43 CFR Part 4.

2. Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

A management plan decision for the Yaquina Head Outstanding Natural Area implementing actions to remove various structures and develop a visitors center and to impose restrictions on hang gliding will be affirmed on appeal where the decision is based on an environmental assessment which reflects an evaluation of reasonable alternatives and is sufficient to support an informed judgment. Such a determination may not be overcome by a mere difference of opinion.

APPEARANCES: John W. Broome, president, Oregon Shores Conservation Coalition, Rockaway, Oregon; Bruce Waugh, pro se; Joseph C. Dose, Salem, Oregon, District Manager, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On March 5, 1980, Congress established the Yaquina Head Outstanding Natural Area (YHONA) in order to protect the unique scenic, scientific, educational, and recreational values of certain lands in and around Yaquina Head in Lincoln County, Oregon. 43 U.S.C. § 1783(a) (1982). Congress mandated

that the Secretary of the Interior administer the YHONA in a manner as to best provide for: (1) The conservation and development of the scenic, natural, and historic values of the area; (2) the continued use of the area for purposes of education, scientific study, and public recreation which do not substantially impair the purposes for which the area is established; and (3) protection of the wildlife habitat of the area. 43 U.S.C. § 1783(b)(1) (1982). Congress required the development of a management plan for the YHONA, and on December 27, 1983, the Salem, Oregon, District Manager, Bureau of Land Management (BLM), issued the Management Plan Decision (MPD) for the YHONA. That decision provided for the right of appeal pursuant to 43 CFR 4.400.

From that decision Oregon Shores Conservation Coalition (OSCC) and Bruce Waugh filed separate appeals. Although they arise from the same decision, the grounds for appeal are unrelated. The MPD addressed 12 major issues. The subject of the OSCC appeal is issue 7 which relates to certain abandoned structures under the jurisdiction of the United States Coast Guard and to the development of visitor facilities. The Waugh appeal concerns issue 5 which deals with use regulations. Waugh's concern is with certain limitations on hang gliding.

[1] Before addressing the substance of these appeals, we will examine a procedural question that this case presents. That question is whether or not the actions sought to be reviewed are properly before the Board. In the case of development of a resource management plan (RMP) by BLM pursuant to 43 CFR Part 1600, protests to approval of such a plan are reviewable only in accordance with 43 CFR 1610.5-2. In such a situation the protest is filed with the Director, BLM, and the decision of the Director is final for the Department. 43 CFR 1610.5-2(b). In this manner the Department has, by regulation, established this procedure for administrative review of RMP's. An RMP is defined in the BLM Manual 1601.07 as a land use plan as prescribed by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (1982). The management plan in this case is not a land use plan prescribed by FLPMA. Thus, it is not an RMP.

The Board has held that the BLM review procedures are equally applicable to protests filed against management framework plans (MFP). Oregon Natural Resources Council, 78 IBLA 124, 127 (1983). ^{1/} The management plan in this case is not an MFP. An MFP is defined in the BLM Manual 1601.07 as a planning decision document prepared before the effective date of the regulations implementing the land use provisions of FLPMA. Herein, the plan was prepared after the effective date of those regulations. Although the plan in this case is neither an RMP nor an MFP, the regulations in 43 CFR Part 1600 provide some guidance in addressing the review question.

^{1/} In that case we also stated that even though BLM had informed Oregon Natural Resource Council of a right to appeal to the Board, such a statement was not dispositive of the right of appeal. The Board held that it is the arbiter of its jurisdiction and that neither employees of BLM nor attorneys in the Solicitor's office may create or deny the right to appeal to the Board. Id. at 127.

The definition for an RMP at 43 CFR 1601.0-5(k) provides that an RMP "is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulation." The development of the management plan for the YHONA involved many of the same types of steps as outlined in 43 CFR Part 1600, and to an extent the issuance of the MPD was the final implementation decision on various actions. For that reason BLM's extension of the right of appeal to the Board was not inappropriate. Cf. 43 CFR 1610.5-3(b) (person adversely affected by a specific action implementing some portion of an RMP has a right to appeal pursuant to 43 CFR 4.400). The decision not to utilize the Coast Guard structures and to acquiesce in their removal was tantamount to a final implementation action. There would be no further action by BLM from which OSCC might seek administrative review within the Department. Likewise, the determination to regulate hang gliding was a final action from which appeal might be sought. 2/

On October 4, 1983, BLM issued an environmental assessment (EA) concerning future management of the YHONA. The EA set forth a proposed action and four alternatives for management. The EA provided for a 30-day review and comment period which resulted in a substantial response. Both appellants participated in the comment process. With regard to the issues involved herein, the proposed action set forth in the EA was to prohibit hang gliding and not to utilize two residences and a garage and to construct a visitors center. 3/

2/ We note that the MPD at page 11 contains a section titled "Implementation," which states that implementation of the MPD is dependent on available funding. The section, however, relates to funding for developmental actions such as construction of signs, gates, observation decks, fences, etc. It does not indicate that building removal or the regulation of hang gliding are actions contingent on funding or that either of these actions requires further specific plans.

3/ Within the boundaries of the YHONA are the Yaquina Head Light Station which is Oregon's tallest and second oldest active light tower, having been constructed in 1872-73. The light station is no longer a manned facility, and the station has been nominated for entry in the National Register of Historic Places. Adjacent to the light station are two abandoned residences, one constructed in 1925 and another in 1938, and a garage. Since the structures are located on lands administered by the United States Coast Guard, on Apr. 29, 1983, BLM requested that the Coast Guard refrain from taking any action concerning the structures until BLM completed its management plan for the YHONA. This was done to preserve BLM's management planning options and allow evaluation of all alternatives, including one that utilized the structures for administrative purposes. Following issuance of the MPD, BLM advised the Coast Guard by letter dated Mar. 12, 1984, that the abandoned structures would not be needed for management purposes. By letter dated Mar. 27, 1984, BLM informed OSCC as follows:

"The U.S. Coast Guard, Thirteenth Coast Guard District, has just informed us of their final decision regarding the disposition of abandoned structures (two residences and a garage) located within the Yaquina Head Light Station. Based on their assessment of the situation, all three structures are to be removed from the headland. While we do not know when removal

The MPD endorsed the proposed action of not utilizing the existing structures and provided that a "central visitor facility will be developed at the tip of the headland adjacent to the centralized parking area." ^{4/} The MPD also modified the hang gliding prohibition to provide as follows:

Hang gliding activities will be restricted to historically-used sites located east of the ridge forming the western wall of the upper quarry area. North of Ocean Drive, hang gliding activity will not be regulated and use may continue throughout the year. South of Ocean Drive, hang gliding will be regulated annually during the critical portion of the sea bird nesting period.

We will first address the appeal of OSCC concerning the structures and visitors center. OSCC argues against removal of the structures, stating that they are landmarks of local significance and of longstanding and established aesthetic and community value and that their retention and utilization would be of minimal cost. OSCC also objects to the placement of the visitors center, stating that "the area functions well now as an area of outstanding public interest without a visitors facility on the headland top or anywhere else in the ONA [outstanding natural area]." (Emphasis in original.) OSCC characterizes BLM's MPD as a "dramatic departure" from the proposed action.

In its response BLM states that its determination on the structures and visitors center was based on a number of factors. BLM estimates that in calendar year 1983 nearly 250,000 people visited the YHONA. BLM believes a central visitor facility is needed to control parking and visitation volumes, as well as to meet visitor convenience expectations. It states that the Coast Guard structures are simply too small to handle the existing and expected visitor use. BLM contends that a new facility, designed to incorporate public restrooms, interpretive displays/media, and an administrative office, will be functionally superior to any space that would be created by remodeling the existing structures. BLM further explained:

A central visitor facility and its immediate surroundings, regardless of location, will be a focal point for intensive visitation. Physical separation of such a heavily visited and noisy

fn. 3 (continued)

work is scheduled to commence, the Coast Guard indicated that a contract has been issued for the project.

"Since your appeal of our December 27, 1983, decision regarding future management of the Yaquina Head Outstanding Natural Area included, among other topics, the issue of utilizing the structures to be removed, we feel obligated to advise you of the Coast Guard's intentions. We also want to stress once again that although these structures are located within designated Outstanding Natural Area boundaries, they are not under Bureau jurisdiction and the Coast Guard is exercising its authority to remove them legally."

^{4/} The placement of the visitors center represented a modification of the proposed action which had been to place the facility "in the vicinity of the centralized parking area of the reclaimed upper quarry."

place from the headland's largest area of seabird nesting, resting and roosting habitat is a major consideration which influenced the Issue 7 management action. The U.S. Coast Guard's abandoned residence structures are located such that their development into a main visitor facility would focus visitor-related congestion and noise too near critical wildlife habitat. Development of a new facility, east of the planned centralized parking area, would provide the separation needed to reduce conflicts between concentrated visitation and sensitive wildlife habitat.

(Answer at 10).

In response to OSCC's complaint about relocation of the visitors center BLM stated:

Public response to the environmental assessment overwhelmingly favored management alternatives which would allow continued motor vehicle access and parking near the tip of the headland. If a central visitor facility is to be functional, its logical location would be near the central parking area. To develop a centralized parking area near the tip of the headland to accommodate visitation preferences, and then place the central visitor facility in the vicinity of the upper quarry area is not only illogical from a site design standpoint, it would do nothing to enhance our efforts to manage visitors.

(Answer at 11).

While BLM admitted in the MPD that the cost differential between upgrading the existing structures and developing a new facility would be minimal, it found that development of a new facility was in the best public interest when such factors as functional requirements, long-term operation and maintenance costs, and protection of wildlife habitat were considered.

[2] This Board has held that a BLM management decision will be upheld on appeal where the decision is based on an environmental assessment which reflects an evaluation of the environmental impacts sufficient to support an informed judgment. Defenders of Wildlife, 79 IBLA 62 (1984); SOCATS (On Reconsideration), 72 IBLA 9 (1983). In this case in preparing the EA, BLM was acting pursuant to the congressional mandate to devise a management plan for the YHONA which would best provide for: (1) Conservation and development of scenic, natural, and historic values of the area; (2) continued use of the area for the purposes of education, scientific study, and public recreation which would not substantially impair the purposes for which the area was established; and (3) protection of the wildlife habitat of the area.

Review of the EA, the MPD, and the answer provided by BLM establishes that BLM clearly set forth the available alternatives for use of the existing structures. Analysis of the options and consideration of comments lead BLM to the conclusion that the structures should be removed and a visitors center developed.

OSCC charges that the MPD is a "dramatic departure from what the public understood to be the Proposed Action." We find no basis for this claim. The proposed action in the EA was to remove the structures. The only modification in the MPD was a relocation of the visitors center. The rationale for this modification was adequately explained in the MPD.

OSCC has failed to establish any error in BLM's determination on issue 7. OSCC's arguments appear to be little more than a difference of opinion with BLM as to the proper disposition of the structures and the necessity for a visitors center. Such a difference of opinion is insufficient to overcome BLM's determination for which there is abundant support in the record. See Curtin Mitchell, 82 IBLA 275 (1984); In Re Otter Slide Timber Sale, 75 IBLA 380, 384 (1983). It reflects careful consideration and a thorough examination of reasonable alternatives.

We next turn to the appeal filed by Bruce Waugh. His appeal challenges BLM's determination to regulate hang gliding. BLM's proposed action in its EA was to prohibit hang gliding in the YHONA. BLM indicated in the MPD that the response to its proposed action on hang gliding in the EA revealed that a significant majority of commenters thought hang gliding should be permitted to the extent possible, provided it did not disturb sea birds west of the upper quarry and on the offshore islands. BLM related that of those who favored prohibition of hang gliding the major concern was its effect on sea birds. In the MPD, BLM modified its position on hang gliding, as set forth, supra.

On appeal Waugh presents substantially the same information that he submitted to BLM in response to the EA. This consists principally of a 13-page paper which begins, "This is a comment to the Bureau of Land Management's environmental assessment regarding Yaquina Head Outstanding Area." In that respect it was specifically addressing BLM's proposed action prohibiting hang gliding, a position which was modified in the MPD.

Waugh's 13-page paper was analyzed during the EA comment period by a BLM outdoor recreation planner. The paper was also reviewed and commented upon by an employee of the United States Fish and Wildlife Service. In his statement of reasons Waugh responds point-by-point to the comments made by the BLM employee and to some of the remarks by the Fish and Wildlife Service employee.

The entire thrust of Waugh's statement of reasons is that there are insufficient reasons to restrict hang gliding activity. He states that BLM lacks any kind of scientific data to support the proposition that hang gliding adversely affects sea birds. Waugh accuses BLM of establishing its restrictions on hang gliding on the basis of suggestions "by the same birders who originally wanted to ban the sport completely" (Statement of Reasons at 7, IV Response to Management Plan).

Waugh asserts that the "burden of proof" is on BLM "to prove that hang gliding so substantially impairs the values of Yaquina Head that it must be restricted" (Statement of Reasons at 8, V Conclusion). This assertion by Waugh is completely misplaced. BLM bears no such burden. BLM acknowledges that the hang gliding issue involved a choice between the opinions of two opposing interest groups. On the one hand, hang glider enthusiasts sought

unrestricted use, while individuals and groups concerned with the sea bird population supported prohibition or severe restriction of hang gliding. BLM points out, however, that neither group had site-specific data supporting their opinion.

BLM states in its answer that given its management responsibilities and faced with the polarized opinion, it "hammered out a 'middle ground' management action we believe will not severely compromise hang gliding activities or the wildlife values we are mandated to protect" (Answer at 6).

BLM further explained the rationale for its decision as follows:

North of Ocean Drive (Line C-C) [on Appendix H, a map of the YHONA] and east of the ridge forming the western wall of the upper quarry (Line B-B), hang gliding activity will not be regulated seasonally and use may continue throughout the year. Both the north and south set up and launch sites are located in this unregulated zone as are both of the basic flight-path areas (red). All but a fraction of the northern total flight-path area (yellow) and roughly half of the southern total flight-path area (yellow) are located in the unregulated zone. It is important to note here that the sliver of yellow extending west of Line B-B in the northern total flight-path area lies directly over crucial nesting habitat of Pelagic Cormorants (reference Appendix H, Area #2). This is the primary reason for the decision to preclude hang gliding activity west of the ridge forming the western wall of the upper quarry area. When compared to the total possible northern flight-path area identified by the appellant, the area where hang gliding activity is precluded by the decision is a very small amount of flying space.

South of Ocean Drive (Line C-C) and east of the ridge forming the western wall of the upper quarry (Line B-B), hang gliding activity will be regulated seasonally during the critical portion of the seabird-nesting period and will not be regulated during the balance of the year. Depending on the status of the nesting seabirds in a given year, the seasonal regulations on hang gliding activity may vary from total preclusion during part of the nesting season to such lesser restrictions as specific flying elevation above nesting habitat and flight-path boundary adjustments. These will depend on an annual assessment of the headland's seabird rookery by wildlife biologists of the BLM, U.S. Fish and Wildlife Service and Oregon Department of Fish and Wildlife. It is important to note here that the southern total flight-path area lies directly over crucial nesting habitat of Pigeon Guillemots (reference Appendix H, Area #1). This is the primary reason for the decision to annually regulate hang gliding activity south of Ocean Drive during the critical portion of the seabird-nesting period. Taken into consideration, too, is the fact that during the regulated period, much of the hang gliding activity occurs in the northern flying area rather than the southern flying area due to the presence of the prevailing north

and northwest winds. In contrast, the southern flight-path area is primarily used during the winter-month period due to the prevailing south and southwest winds. Since use is shifted away from the southern flight-path area during the nesting season because of better flying opportunities elsewhere on the headland, the real effect of the regulated period on hang gliding activity is greatly diminished.

(Answer at 7-8).

BLM's determination on the hang gliding issue is adequately supported by the record. Its attempt to balance the interests of two opposing groups has apparently met with success from all but Waugh. Waugh criticizes BLM's approach as being overly cautious. Waugh believes that his paper provides sufficient information to establish that hang gliding should be unrestricted in the YHONA. Moreover, he characterizes BLM's view on this issue as "an example of bias."

Waugh's interest in hang gliding has apparently blinded him to the congressional mandates imposed on the Secretary and delegated to BLM. Management of an area to provide for consideration of various interests necessarily involves a balancing and weighing process. BLM's determination to restrict hang gliding in certain areas and during certain times reflects careful consideration of the interests of all users of the YHONA. Waugh's criticism of BLM's cautious approach fails to recognize that any blame for mismanagement or for hang gliding activities which might prove deleterious to sea birds or other wildlife would not be directed at Waugh; BLM would shoulder that blame. A determination regarding user-group regulation which reflects a careful, conscientious, thorough consideration of all interests will not be disturbed on the basis of an expressed difference of opinion by one user.

BLM indicates that it will be continually monitoring the actions at YHONA, and that if an action is not managerially effective and change is necessary, alternatives will be analyzed, and a new action will be implemented. Thus, there is a possibility that hang gliding restrictions may be modified in the future.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge.